ORIGINAL

No. 01-6978 (2)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

GARY ALBERT EWING

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA

Respondent.

PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Gary Albert Ewing, submits his affidavit in support of his motion for leave to proceed in forma pauperis. Petitioner asks for leave to file his Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Six, without prepayment of costs and to proceed *in forma pauperis*, under Rules 12.2 and 39 of the U.S. Supreme Court Rules, and 28 U.S.C. section 1915. Petitioner's motion for leave to proceed in forma pauperis was submitted to this Court in a separate document.

Petitioner has previously been granted leave to proceed *in forma pauperis* in the California Court of Appeals, Second Appellate District and the California Supreme Court pursuant to California Penal Code section 1240(a)(1).

Dated: October 18, 2001

Respectfully submitted,

Karyn H. Bucur

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by appointment of the
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3 pp
(10)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

(Form 4)

Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

XXXX

7. *State the persons who rely on your or your spouse for support.*

Name	Relationship	Age

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	Your Spouse
For home-mortgage payment (include lot rented for mobile home)	$ N/A	$
Are real-estate taxes included? • Yes • No	$ N/A	$
Is property insurance included? • Yes • No	$	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 11	$
Home maintenance (repairs and upkeep)	$	$
Food	$ 11	$
Clothing	$	$
Laundry and dry-cleaning	$ 11	$
Medical and dental expenses	$ 11	$
Transportation (not including motor vehicle payments)	$ 11	$
Recreation, entertainment, newspapers, magazines, etc.	$ 11	$
Insurance (not deducted from wages or included in mortgage payments)	$ 11	$
Homeowner's or renter's	$ 11	$
Life	$ 11	$
Health	$ 11	$
Motor Vehicle	$ 11	$
Other: N/A -	$ 11	$
Taxes (not deducted from wages or included in mortgage payments) (specify): N/A	$ 11	$
Installment payments	$ 11	$
Motor Vehicle	$ 11	$
Credit card (name):	$ 11	$
Department store (name):	$ 11	$
Other:	$ 11	$
Alimony, maintenance, and support paid to others	$ 11	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 11	$
Other (specify): N/A - 1	$ 11	$
Total monthly expenses	$ 0.	$ 0

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*

• Yes • (No) If yes, describe on an attached sheet.

10. *Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form?*

• Yes • (No) If yes, how much: $ _____

If yes, state the attorney's name, address, and telephone number:

_____

_____

_____

11. *Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*

• Yes • (No) If yes, how much? $ N/A

If yes, state the person's name, address, and telephone number:

_____

_____

_____

12. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

13. *State the address of your legal residence.*

CMF_Vacaville, Mr. Gary Ewing, J-15228, P.O. Box 2000
T-Wing 229, Vacaville, CAL 95696 (state prison)

Your daytime phone number: (_____) _____

Your age: 39 Your years of schooling: _____

Your Social Security number: _____

ORIGINAL

No. 01-6978

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

GARY ALBERT EWING

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT
DIVISION SIX

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES 3

QUESTION PRESENTED 4

OPINION BELOW 5

JURISDICTION 6

STATUTES INVOLVED IN THIS CASE 7

STATEMENT OF THE CASE 14

SUMMARY OF ARGUMENT 15

REASONS FOR GRANTING THE WRIT 16

REVIEW SHOULD BE GRANTED IN THIS CASE BECAUSE CALIFORNIA'S THREE STRIKES LAW CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION WHRE THE CRIME IS STEALING GOLF CLUBS AND CAN BE CHARGED AS A MISDEMEANOR 16

CONCLUSION 22

APPENDIX 1
The Decision from the Court of Appeal of the State of California, Second Appellate District, Division Six dated April 25, 2001 23

APPENDIX 2
Order Denying Petition For Review in the California Supreme Court on July 11, 2001 33

TABLE OF AUTHORITIES

CASES PAGE

Harmelin v. Michigan
501 U.S. 957, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) ..19

People v. Cortez
73 Cal. App. 4th 276 (1999) 20

People v. Deloza
18 Cal. 4th 585 (1998) 21

People v. Douglas
79 Cal. App. 4th 810 (2000) 18

People v. Superior Court (Alvarez)
14 Cal. 4th 968 (1997) 18

People v. Superior Court (Romero)
13 Cal. 4th 497 (1996) 18

Riggs v. California
525 U.S. 1114, 119 S. Ct. 890, 142 L. Ed. 789 (1999) .19, 21

Stanley Durden v. California
121 S. Ct. 1193, 148 L. Ed. 2d 1027 (2001) 22

Witte v. United States
515 U.S. 389 19

STATUTES AND RULES

FEDERAL

28 United States Code § 1257 5

CALIFORNIA

California Penal Code section 17(b) 6, 18

California Penal Code section 487 (a) 7, 14, 18

California Penal Code section 489 (b) 7, 18, 19

California Penal Code section 667 (b) 7, 14

California Penal Code section 1170.12 (a)-(d) 10, 14

QUESTION PRESENTED

DOES PETITIONER'S TWENTY-FIVE YEAR TO LIFE PRISON SENTENCE VIOLATE FEDERAL CONSTITUTIONAL PROVISIONS AGAINST CRUEL AND UNSUAL PUNISHMENT BECAUSE HIS SENTENCE IS GROSSLY DISPROPORTIONATE TO THE OFFENSE OF *"STEALING GOLF CLUBS"*?

The petitioner Gary Albert Ewing respectfully prays that a writ of certiorari issue to review the decision issued by California Court of Appeal, Second Appellate District, Division Six. The California Supreme Court denied review.

OPINION BELOW

On April 25, 2001, the Court of Appeals of the State of California, Second Appellate District, Division Six, filed an unpublished decision in People v. Ewing, Case number B143745. A copy of that order is attached hereto as Appendix "1".

Petitioner filed a petition for review in the California Supreme Court and the petition was summarily denied on July 11, 2001. A copy of that order is attached hereto as Appendix "2"

JURISDICTION

On July 11, 2001, the California Supreme Court denied review in this case. (App."2".) The instant Petition for Writ of Certiorari is filed within 90 days of that order. (Rule 13)

Petitioner invokes the jurisdiction of this Court under Title 28 U.S.C. § 1257 on the ground that his rights under the Eighth Amendment to the United States Constitution were violated.

STATUTES INVOLVED IN THIS CASE

California Penal Code section 17 (b)

§ 17. "Felony," "misdemeanor," and "infraction" distinguished; Reduction of misdemeanors to infractions

(a) A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(1) After a judgment imposing a punishment other than imprisonment in the state prison.

(2) When the court, upon committing the defendant to the Youth Authority, designates the offense to be a misdemeanor.

(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.

(5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

California Penal Code section 487(a)

Grand theft is theft committed in any of the following cases:

(a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400), except as provided in subdivision (b).

California Penal Code section 489(b)

Grand theft is punishable as follows:

(b) In all other cases, by imprisonment in a county jail not exceeding one year or in the state prison.

California Penal Code § 667 subdivision (b) through (i)

§ 667. Habitual criminals; Enhancement; Exceptions

(a) (1) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(2) This subdivision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this subdivision to apply.

(3) The Legislature may increase the length of the enhancement of sentence provided in this subdivision by a statute passed by majority vote of each house thereof.

(4) As used in this subdivision, "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

(5) This subdivision shall not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any

precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.

(b) It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the

manner prescribed by law.

(8) Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2) (A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.

California Penal Code section 1170.12

Aggregate and consecutive terms for multiple convictions; Prior conviction as prior felony; Commitment and other enhancements or punishment

(a) Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions, as defined in subdivision (b), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of this section shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial

sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for the purposes of sentence enhancement if:

(A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and

(B) The prior offense is

(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or

(ii) listed in this subdivision as a felony, and

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a

prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or

(ii) twenty-five years or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(d) (1) Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

STATEMENT OF THE CASE

On April 10, 2000, petitioner was charged by Information in the State of California with one count of grand theft of personal property and one count of burglary. (CT 25-26.)

The Information further alleged that petitioner suffered four serious or violent prior convictions. (Cal. Pen. Code §§ 1170.12 subd. (a) through (d) and 667 subd. (b) through (i).) (CT 25-26.)

Jury Trial began on June 9, 2000, and concluded on May 14, 2000, when the California jury found petitioner guilty of grand theft of personal property in violation of California Penal Code section 487 subdivison (a) and not guilty of burglary. (CT 36-42, 82-85.)

The trial court sentenced petitioner as a third striker to a total term of twenty-five years to life with possibility of parole. (CT 93.)

Petitioner filed a timely notice of appeal from the judgment of conviction and sentence. (CT 94.) Petitioner argued to the California Court of Appeals that his sentence constitutes cruel and unusual punishment in violation of both federal and state constitutions. Petitioner argued that his sentence is grossly disproportionate to the offense of "stealing golf clubs". In California, the crime is a "wobbler" and the crime could have been sentenced as a misdemeanor.

The California Court of Appeal disagreed and affirmed petitioner's twenty-five years to life sentence for stealing golf clubs. The California Court of Appeals specifically found that Petitioner's sentence did not violate the Eighth Amendment. "Nor does his sentence violate the Eighth Amendment. The United States Supreme Court has "repeatedly upheld recidivism statutes" against contentions that they constitute cruel and unusual punishment. (Appendix "1", p. 7.)

Petitioner timely filed a Petition for Review in the California Supreme Court. Petitioner argued that California Supreme Court should grant review to consider if petitioner's twenty-five years to life sentence for stealing golf clubs violates the Eighth Amendment. On July 11, 2001, the California Supreme Court summarily denied the petition. (Appendix "2").

SUMMARY OF ARGUMENT

Petitioner was sentenced to twenty-five years to life under California's Three Strike Law for stealing golf clubs from a pro shop. The offense could have been sentenced as a misdemeanor and the penalty for grand theft in California does not exceed one year in prison. Petitioner argues that his sentence violates the Eighth Amendment of the United States Constitution because serving twenty-five years to life for stealing golf clubs is cruel and unusual

punishment.

REASONS FOR GRANTING THE WRIT

REVIEW SHOULD BE GRANTED IN THIS CASE BECAUSE CALIFORNIA'S THREE STRIKES LAW CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION WHERE THE CRIME IS STEALING GOLF CLUBS AND CAN BE CHARGED AS A MISDEMEANOR

1. Summary of Facts

On March 12, 2000, Mr. Joshua Alpert, was working at the pro golf shop at the Lakes At El Segundo Golf Course in Los Angeles County. (RT 347.) He observed petitioner walk into the shop at approximately 8:00 a.m. (RT 350-351.) Petitioner browsed around for about ten to fifteen minutes. (RT 352.) Petitioner purchased a small bucket of golf balls to use at the driving range. (RT 352.) After he made the purchase, petitioner stayed in the pro shop looking at the golf clubs for another five minutes. (RT 353.) Mr. Alpert never saw petitioner with a golf club. Petitioner told him that he was waiting for a friend to play golf. (RT 365-367.)

Petitioner asked Mr. Alpert where the driving range was located. Mr. Alpert instructed petitioner to go out the door and walk left towards the driving range. (RT 355.) As petitioner was walking out the shop, Mr. Alpert noticed that petitioner was limping and turned right towards

the parking lot. (RT 355.)

Mr. Alpert called 911. (RT 356.) Officer Richard James Haney and his partner responded to the call and drove to the golf course. (RT 382-382.) Officer Haney saw petitioner in the golf course parking lot. Petitioner turned and walked between two parked vehicles. Petitioner was walking with a stiff leg. (RT 386-387.)

Officer Haney got out of his car, walked toward petitioner, and saw petitioner pull three golf clubs out of his pants. (RT 387.) Mr. Alpert identified the golf clubs as belonging to the shop and also identified petitioner. (RT 388.) The golf clubs sell for $399.00 a piece. (RT 363.) Petitioner was placed under arrest. (RT 389.)

2. A Life Sentence For Stealing Golf Clubs Violates the Eighth Amendment of the United States Constitution Because The Life Sentence Is Grossly Disproportionate To the Crime

California has a sentencing scheme, known as the Three Strikes Law, which mandates a sentencing judge to impose a minimum sentence of twenty-five years to life imprisonment if the person has two prior qualifying felony convictions and the present conviction is any "felony".

People v. Superior Court (Romero) 13 Cal. 4th 497, 505 (1996).

In the present case, petitioner received a twenty-five year to life prison sentence pursuant to the California Three Strikes Law for stealing golf clubs. (CT 93.) The crime in this case is known as a "wobbler". A "wobbler" is an offense that could either be classified as either a felony or misdemeanor. The law authorizes trial courts to classify certain offenses at sentencing as a misdemeanor, instead of a felony. (Cal. Pen. Code § 17 subd. (b).)

"Section 17 subdivision (b) authorizes the reduction of "wobbler" offenses—crimes that, in the trial court's discretion, may be sentenced alternately as felonies or misdemeanors—upon imposition of a punishment other than state prison or by declaration as a misdemeanor after a grant of probation." People v. Superior Court (Alvarez), 14 Cal. 4th 968, 974. (1997)

Petitioner was convicted of grand theft in violation of California Penal Code section 487 subdivision (a). California Penal Code section 487 subdivision (a) is a "wobbler" offense and may be sentenced either as a misdemeanor or felony. People v. Douglas, 79 Cal. App. 4th 810, 813. (2000). A punishment for grand theft in California is punishable by imprisonment in a county jail not exceeding one year or in the state prison. Cal. Penal

Code § 489. Petitioner's prior convictions or "strikes" stemmed from four convictions of robbery and burglary from a single case. Petitioner was convicted of these four convictions on March 8, 1994. (CT 26.)

The Eighth Amendment of the United States Constitution prohibits infliction of cruel and unusual punishment. Under the United States Constitution, the issue is whether or not the sentence is "grossly disproportionate" to the crime. Harmelin v. Michigan 501 U.S. 957, 1001, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991).

The Supreme Court has "repeatedly emphasized that under recidivist sentencing schemes "the enhanced punishment imposed for the [present] offense is not to be viewed as–[an] additional penalty for the earlier crimes, but instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." Riggs v. California 525 U.S. 1114, 119 S. Ct. 890, 142 L. Ed. 789, citing Witte v. United States, 515 U.S. 389, 400.) In this case, twenty-five years to life for stealing golf clubs cannot be justified as a "stiffened penalty" for stealing golf clubs because the actual punishment for the crime does not exceed one year in prison. Cal. Pen. Code section 489.

There are situations when the Three Strikes Law provides appropriate sentences: Sentences under the Three

Strikes Law have been held not to constitute cruel and unusual punishment when the defendants have adopted a criminal life style and have demonstrated no intention to function as a responsible member of the community. People v. Cortez, 73 Cal. App. 4th 276, 285 (1999). In Cortez, the court found that Cortez' twenty-five year to life sentence did not constitute cruel or unusual punishment because he had a history of violent conduct and that he is a threat and danger to the welfare of the community. (Id.)

In the instant case, the trial court found that petitioner, who was recently released on parole, did not pose a threat to commit violent crimes, but only posed a threat to commit theft offenses. (RT 1510.)

Unlike the petitioner in Cortez, the appellant in this case has demonstrated he has the intention of becoming drug free for the remainder of whatever life he has left and intends to function as responsible member of the community by participating as an Aids advocate. (RT 1505-1508.) In addition, the sentence of twenty-five years to life is cruel and unusual punishment for a person who is seriously ill and does not expect to live very long because he stole golf clubs.

"The United States Supreme Court has declared that the basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power

to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." People v. Deloza 18 Cal. 4th 585, 601 (1998). Petitioner's sentence is not within the limits of civilized standards for the offense he committed.

Several justices of this Court expressed interest in the constitutionality of California Three-Strikes Law: Justice Souter, in a dissent wrote, "Two terms ago this Court denied certiorari in Riggs v. California, 525 U.S. 1114, 142 L. Ed. 789, 119 S. Ct. 890 (1999). The issue was an Eighth Amendment challenge to California's statutory scheme that allows a petty theft (normally a misdemeanor) to be counted as a third felony for purposes of a three-strikes law, resulting in a sentence of 25 years to life. This case raises the same issue; the value of the goods taken was $43.00. Justice Breyer dissented from the denial of certiorari in Riggs while Justice Stephens filed an opinion respecting the denial, in which Justice Ginsburg and I joined. A principal reason that the three of us were led to concur in the denial of review was the expectation that rulings by other courts on challenges to the California scheme would be valuable to us in any examination of the issue we might ultimately give it. I no longer think this is a sufficient reason to postpone what I assume will inevitably be a decision at some point to examine the

matter—On these facts, I would wait no longer. The issue is serious, the state courts have had adequate opportunity to consider it, and the stakes are substantial." (Stanley Durden v. California, (2001) 121 S. Ct. 1183, 148 L. Ed. 2d. 1027)

Petitioner asked the California Supreme Court to take his case and decide the constitutionality of the Three Strikes Law. The California Supreme Court declined. Petitioner now asks this Court to take his case and decide whether or not people convicted in California for misdemeanor type crimes should spent the rest of their lives in prison.

CONCLUSION

For the foregoing reasons petitioner respectfully submits that the petition for writ of certiorari should be granted.

Dated: October 2, 2001

Respectfully submitted,

Karyn H Bucur

Karyn H. Bucur
Attorney for Petitioner

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY ALBERT EWING,

Defendant and Appellant.

2d Crim. No. B143745
(Super. Ct. No. YAO43550)
(Los Angeles County)

COURT OF APPEAL-SECOND DIST.
FILED
APR 25 2001
JOSEPH A. LANE, Clerk
Deputy Clerk

A jury found Gary Albert Ewing guilty of grand theft and acquitted him of burglary. The trial court found he had suffered four prior serious or violent felony convictions within the *meaning of* California's Three Strikes law. The court declined to reduce the grand theft charge to a misdemeanor or strike any of his prior "strike" convictions and sentenced him to 25 years to life in prison. (Pen. Code, §§ 17, subd. (b) (hereafter section 17(b)); 667, subds. (b)-(i); 1170.12.)[1]

Appellant contends the trial court abused its discretion in refusing to reduce his current "wobbler" conviction to a misdemeanor and strike his prior convictions. He also challenges the sufficiency of the evidence to support the court's

[1] All statutory references are to the Penal Code.

Appendix "1" (23)

finding that he was the person who suffered the prior strike convictions. We reject his contentions and affirm.

FACTS

In March of 2000, an employee of the pro golf shop at the El Segundo Golf Course observed appellant enter the shop, look at golf clubs for 10 to 15 minutes, and purchase a small bucket of balls to use on the driving range. Appellant asked for directions to the driving range and walked back to the golf clubs. There were other customers in the shop during this time.

The employee observed that appellant was "noticeably limping" when he walked out of the shop and, instead of walking in the direction of the driving range, he walked toward the parking lot. Realizing that appellant looked "totally out of place," the employee called 911.

Officer Richard Haney of the El Segundo Police Department arrived and saw appellant walking stiff legged between two parked vehicles. He saw appellant pull three golf clubs out of his pants and arrested him. The employee testified the clubs were Calloway golf clubs priced at $399 each, they had the shop's identification number on them, appellant had not paid for them, and he did not have permission to take them out of the store.

The Motion to Reduce the Wobbler Offense to a Felony

In a bifurcated proceeding, the prosecution presented evidence that appellant had previously been convicted in 1993 of first degree robbery and three separate residential burglaries, all serious or violent felonies under the Three Strikes law.

At sentencing, defense counsel orally moved the court to reduce the current grand theft conviction to a misdemeanor pursuant to section 17(b) and to strike "an appropriate number" of his prior convictions. His counsel observed that, of his four prior serious felony convictions, two were nonviolent, appellant was 38 years old, and his health problems would minimize the chance of future criminal activity (he was ill

(24)

with AIDS and blind in one eye). Defense counsel argued his theft-related offenses were drug related and he had not received assistance for his drug problem. The prosecution countered that appellant had suffered 10 convictions and had repeatedly failed at probation and parole.

The trial court did not make an express ruling on the section 17(b) motion but expressly declined to strike any of his prior convictions, reasoning that he was not outside the spirit and intent of the Three Strikes law. The court noted appellant had suffered nine convictions, some of which were misdemeanors, from 1988 through 1993 when he was imprisoned for the robbery and burglary offenses. He was released on parole in June of 1999 and committed the current offense in March 2000, nine months later. The court concluded appellant was a threat to the community based on his recidivism for theft-related offenses. The court imposed the mandatory 25-years-to-life sentence, but struck a prior prison term allegation to eliminate a one-year enhancement under section 667.5.

Appellant first contends the trial court failed to exercise its discretion in ruling on his section 17(b) motion because it made no express findings or rulings on the matter. We disagree. The court impliedly denied appellant's section 17(b) motion when it declined to strike his prior strike convictions.

Alternatively, appellant argues the court abused its discretion in denying the section 17(b) motion by focusing solely on appellant's criminal history and failing to consider other relevant factors. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978-981 (hereafter *Alvarez*) [discussing sentencing considerations in reducing wobbler to misdemeanor].) We reject this contention.

First, the People correctly observe that appellant has waived his right to challenge the denial of his 17(b) motion on this ground. In *People v. Scott* (1994) 9 Cal.4th 331, 353, the California Supreme Court held that the waiver doctrine should apply to "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices . . . [including] . . . cases in which the court purportedly

erred because it . . . misweighed the various [sentencing] factors, or failed to state any reasons or give a sufficient number of valid reasons." The court observed that routine defects in the trial court's statement of reasons are easily prevented and corrected if called to the trial court's attention. (*Ibid.*) Here, had appellant's counsel told the trial court that it should consider various factors other than appellant's criminal history, the trial court could have commented upon such other factors or observed that it had already taken them into account in deciding the motion.

Second, we presume the trial court considered all relevant sentencing criteria in denying the motion unless the record affirmatively demonstrates otherwise. (*Alvarez*, *supra*, 14 Cal.4th at p. 977 ["trial court is presumed to have acted to achieve legitimate sentencing objectives"]; *People v. Kelley* (1997) 52 Cal.App.4th 568, 582.) The record here does not indicate otherwise. Although appellant claims the trial court failed to consider various factors relating to his background (the nonviolent nature of the current offense, his illness, his desire to help the community by participating as an AIDS advocate, and his willingness to enter a drug rehabilitation program), the court heard appellant's arguments, stated it had reviewed appellant's file carefully, and found appellant posed a threat to public safety.

Third, the court acted well within its discretion in treating appellant's offense as a felony. The trial court possesses broad discretion to reduce a wobbler to a misdemeanor pursuant to section 17(b). (*Alvarez*, *supra*, 14 Cal.4th at p. 977.) In exercising this discretion, the court should examine the nature and circumstances of the offense, defendant's attitude toward the offense, defendant's behavior in court, and the general sentencing objectives of California Rules of Court, rule 410. Appellant bears the burden of establishing that his sentence was unreasonable. We do not substitute our judgment for that of the trial court; our standard of review is "extremely deferential and restrained." (*Id.* at pp. 977-778, 981.)

The trial court recognized the current offense was not violent, but noted appellant had been convicted of nine offenses (all but one theft-related) in a five-year

period from 1988 through 1993 and committed the current theft while on parole less than a year after being released from prison. There was no abuse of discretion.

Refusal to Strike the Prior Convictions

Appellant next contends the trial court abused its discretion by refusing to strike one or more of his prior serious felony convictions. We disagree.

Trial courts have limited discretion under section 1385 to strike prior conviction allegations in Three Strikes cases. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.) The trial court must consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes sentencing] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The trial court should also consider the general sentencing objectives under California Rules of Court, rule 410. (*Alvarez, supra,* 14 Cal.4th at p. 978.)

Trial court rulings on *Romero* motions are reviewed under the deferential abuse of discretion standard. (*Alvarez, supra,* 14 Cal.4th at pp. 976-978.) Under that standard, a defendant who seeks reversal must demonstrate the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of the prior convictions. (*Ibid.*; *People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.)[2]

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[2] We reject the People's contention that, pursuant to *People v. Benevides* (1998) 64 Cal.App.4th 728, the denial of a *Romero* motion may not be reviewed on appeal. Though certain language in *Benevides* suggests an abridgment of the defendant's right to appeal, the Court of Appeal modified its opinion on rehearing and clarified, "We do not hold a defendant may not appeal or that a defendant lacks standing to appeal the issue. Rather, we conclude that trial court error for failure to exercise its section 1385

(Fn. cont'd.)

Here, the trial court's sentencing decision was not irrational or arbitrary. Appellant has a lengthy criminal record dating back to 1984, with numerous misdemeanor and felony convictions. The record includes convictions for theft, battery, possession of a firearm, robbery, and burglary. Two of his prior strike convictions were violent and involved the use of a weapon. Appellant's rehabilitative prospects are bleak. He has continuously been on either probation or parole since 1988 and committed the current offense after being released for only nine months. The probation report found no circumstances in mitigation. Given appellant's prior convictions, background, and rehabilitative prospects, the trial court did not abuse its discretion in concluding that appellant was within the spirit of the Three Strikes law and denying his motion.

Cruel and Unusual Punishment

We also reject appellant's contention that his sentence constitutes cruel and unusual punishment in violation of both the federal and state constitutions. He argues his sentence is grossly disproportionate to the offense of "stealing golf clubs." We disagree.

Under our state Constitution, the issue is whether the 25-years-to-life sentence is so disproportionate to the crime for which it was imposed that it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Dillon* (1983) 34 Cal.3d 441.) Under *Lynch*, three factors are critical: (1) the nature of the offense and offender, (2) the sentence compared to sentences for more serious offenses in California, and (3) the sentence compared to sentences for the same offense in other states. (*Lynch*, at pp. 425-427.)

(Fn. cont'd.)

discretion must be affirmatively shown by the record." (*Id.* at p. 733, fn. 6; see also *People v. Myers, supra,* 69 Cal.App.4th at p. 309 [rejecting same contention].)

Appellant's sentence is constitutional under *Lynch*. As discussed above, the sentence is reasonably proportional to the offense and offender. The severity of the sentence was properly affected by his prior convictions under the Three Strikes law, a general recidivist history, and dim prospects for the future. Also, his sentence conforms to sentences for repeat offenders under the Three Strikes law and, although he does not address the issue, it is also constitutionally proportional to sentences for repeat offenders in other states. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1509-1516.) Numerous cases have held that severe sentences under the Three Strikes law do not constitute cruel and unusual punishment under the federal or state constitutions. Cases upholding 25-years-to-life (or more) sentences for arguably minor offenses committed after two or three prior strike convictions include *Martinez*, *supra*, *People v. Goodwin* (1997) 59 Cal.App.4th 1084 and *People v. Cooper* (1996) 43 Cal.App.4th 815.

Nor does his sentence violate the Eighth Amendment. The United States Supreme Court has "repeatedly upheld recidivism statutes" against contentions that they constitute cruel and unusual punishment. (*Parke v. Raley* (1992) 506 U.S. 20, 27.) In *Rummel v. Estelle* (1980) 445 U.S. 263, for example, the Supreme Court upheld the mandatory life sentence, under a Texas recidivist statute, of a defendant convicted of obtaining $120.75 by false pretenses with two prior felony convictions involving nonviolent petty thefts. The court observed that the sentence under a recidivist statute is "based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." (*Id.* at p. 284.) Such a statute serves the legitimate goal of deterring "repeat offenders" and of segregating the recidivist "from the rest of society for an extended period of time." (*Ibid.*) Just as there was no Eighth Amendment violation in the mandatory life sentence imposed for the nonviolent petty offenses in *Rummel*, by analogy appellant's 25-years-to-life sentence is not cruel and unusual. Appellant's sentence was justified because of his recidivism.

Evidence of the Prior Convictions

The evidence offered by the prosecution as proof that appellant had suffered four prior serious or violent felony convictions consisted of a section 969b packet containing a certification letter from the Department of Corrections, a copy of appellant's chronolo l movement history, an abstract of judgment from case No. NA018343, a fingerprint card with appellant's physical description and identifying information, and a small booking photograph of "Ewing, G.," "J15228," dated April 18, 1998. All of the pages in the packet had appellant's name on them, as well as the identical CDC No. "J15228."

Defense counsel objected to the receipt of the certified exhibit on lack of foundation and hearsay grounds, arguing the prosecution had not established beyond a reasonable doubt that appellant was the person who suffered the prior convictions listed on the abstract of judgment. Defense counsel noted the prosecution had not matched the fingerprints in the certified packet to appellant's fingerprints and that, at a minimum, a fingerprint expert should confirm the identification.

The prosecution argued the court could decide whether the photograph in the packet appeared to depict appellant and consider the name on the documents to establish that appellant was the person who suffered the prior convictions. The trial court reviewed the photograph and packet and determined that appellant was the person who suffered the prior convictions.

Appellant contends the evidence was insufficient to identify him as the person who suffered the prior convictions. In ruling on a substantial evidence challenge, we review the entire record "in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) A certified record from a correctional institution constitutes prima facie proof that a prior conviction was suffered. (§ 969b.) Further, it "has long . . . been the

rule in California, in the absence of countervailing evidence, that identity of person may be presumed, or inferred, from identity of name." (*People v. Mendoza* (1986) 183 Cal.App.3d 390, 401; *People v. Sarnblad* (1972) 26 Cal.App.3d 801, 805-806.)

Here, as the People observed, the trial court was able to compare the booking photograph with the physical description on the fingerprint card, including hair color, eye color, age, height, and weight, with appellant who was present in court. Each page of the packet contained appellant's name and identical CDC number for Gary Albert Ewing (J15228). This evidence as a whole satisfied the prosecution's burden of proof. Appellant's contention is without merit.

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Deanne Myers, Judge

Superior Court County of Los Angeles

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Robert F. Katz and Karla Cottis, Deputy Attorneys General, for Plaintiff and Respondent.

Court of Appeal, Second Appellate District, Division Six - No. B143745
S098041

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

GARY ALBERT EWING, Defendant and Appellant.

SUPREME COURT
FILED
JUL 11 2001
Frederick K. Ohlrich Clerk
DEPUTY

Petition for review DENIED.
Werdegar J., was absent and did not participate.

GEORGE
Chief Justice

Appendix "2"
(33)